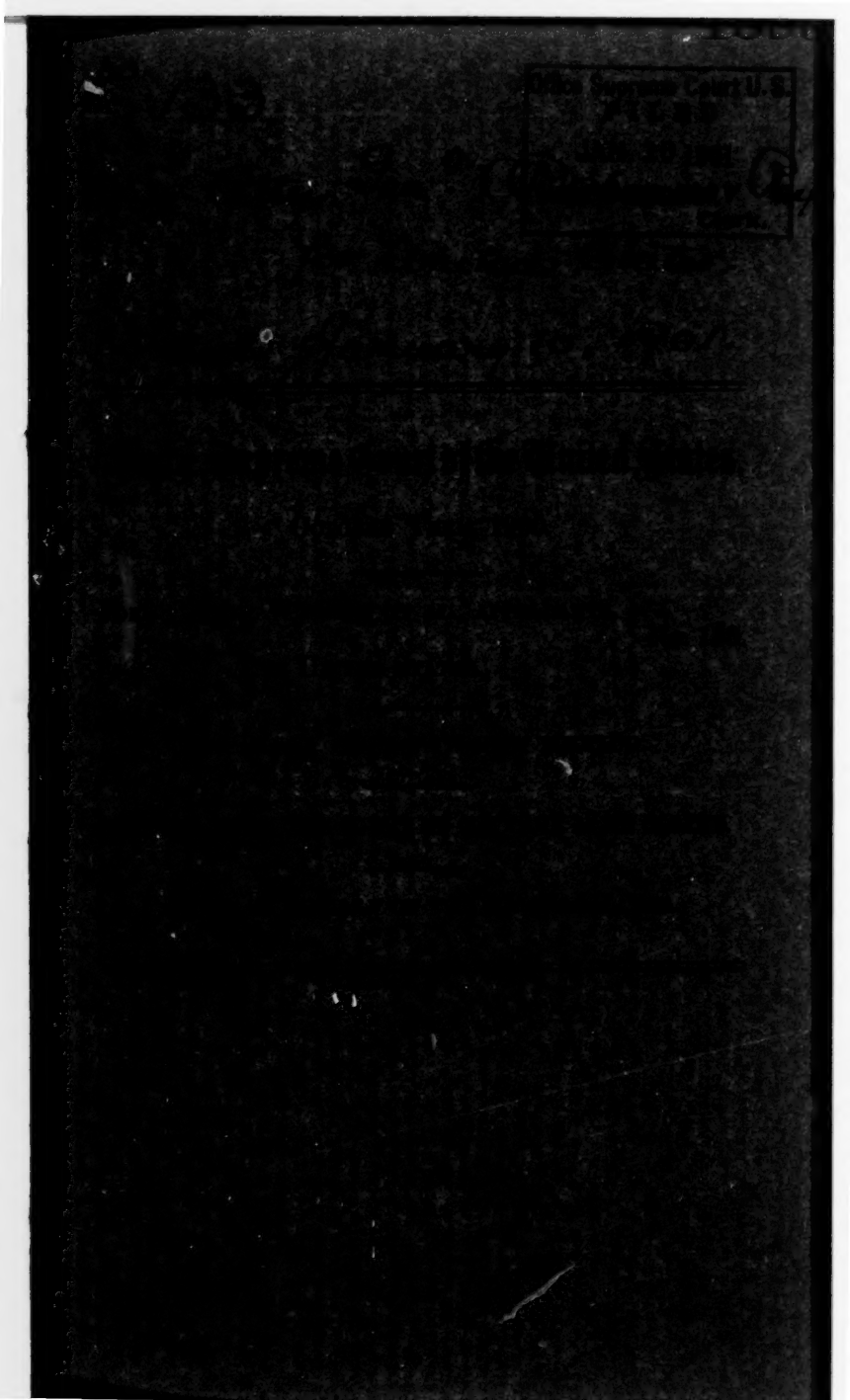

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

JOEL PARKER WHITNEY ET AL., APPELLANTS,
v.
THE UNITED STATES. } No. 133.

ESTANCIA GRANT IN NEW MEXICO.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

On March 1, 1893, the plaintiffs filed their petition in the Court of Private Land Claims, praying the confirmation of the claim commonly known and called the "Estancia grant," alleging the area thereof to be 415,036.56 acres. The petition sets forth with much detail the cause of action (R., 1–7), alleging, among other things:

That on the 7th day of December, 1845, Antonio Sandoval, a Mexican citizen of high distinction, who had theretofore for many years faithfully served the Republic of Mexico as a civil and military officer, and also greatly aided the Republic by loans and advances of large sums of money and of his private estate, for

which the said Republic was then his debtor, presented to Manuel Armijo, then the governor of New Mexico, and then authorized and commissioned by the supreme executive of the said Republic and by the laws of the said Republic to make grants, sales, and other dispositions of the public domain, his petition dated the 5th day of the same month, whereby he prayed the said governor, in the name of the supreme authority of the said Republic, to grant him in possession *integram* the Salt Lakes tract, assigning the boundaries; by which he represented to the governor that the tract was vacant and in a condition of mortmain, and that it would be without prejudice to any third party; that he wished to use the tract of land for the pasture of his live stock. It was further prayed that the said grant, if made, should be made free and exempt from tax.

That with the said petition the said Antonio Sandoval submitted to the said governor for his consideration an official certificate of Jose Serafin Ramirez y Casanoba, comptroller of the departmental treasury of New Mexico, and acting treasurer of the same, dated on the 6th day of the same month, whereby the said comptroller and acting treasurer certified that during the period of forty years (as appeared from records of the treasury) the said Antonio Sandoval had been serving the nation as a military and civil officer, and also that he had loaned numerous sums of money to the treasury of the nation without receiving one-half real interest, and that there were then large sums due him, as

appeared from the entries in the office of the said comptroller and treasurer and the evidence in possession of the said Antonio Sandoval, on account of salaries and loans.

That the said governor, in consideration of the said petition and certificate, and of the facts therein set forth, made, on the 7th day of December, A. D. 1845, in the name of the supreme Government of the Mexican nation, a grant to the said Antonio Sandoval of the land solicited by the said petition, with all the dimensions and pasture lands so asked for, and free and exempt from all tax or tribute, and the said governor, in his granting instrument or decree by which the said grant was so made, recited that the Government was convinced of the valuable services the said Antonio Sandoval had rendered and was then rendering to the country, as well during the time referred to by him in his said petition as also during the six years he served in the administration of the prefecture of the second district, with the salary of $1,500, of which not even a half real had been paid him, the sum due him amounting to $9,000; and he also adjudged and recited that the statements in the said petition were true, and he also declared that the said grant was a just title.

That thereupon, under the direction of the said governor and in conformity with the then existing laws, usages, and customs of the said republic, the proper judicial officer having jurisdiction in that behalf, namely, José Baca y Ortiz, justice of the peace of Real del Oro, delivered to the said Antonio Sandoval juridical seizin

and possession of the said tract of land on the 15th day of December, A. D. 1845, in obedience to the said decree, designating the boundaries:

On the north 1 league from the Berrendo Spring, the said spring being included in the possession; on the south 1 league from the Salt Lakes, the said lakes also being so included; on the east the little hills of the Pedernal, with the range thereof, and on the west the water of the Mesteñas.

That in testimony of his action in that behalf the judicial officer executed and delivered to the said grantee an act of juridical possession in the premises in due form of law that might serve him as formal title.

It is further alleged that Sandoval entered upon, possessed, occupied, improved, enjoyed, and claimed the same in fee simple and maintained thereon an armed force, adequate to the defense thereof, and continued his peaceable and exclusive occupation from the 15th day of December, 1845, until the 8th day of July, 1848, when he conveyed the same to his nephew, Gervacio Nolan, and transferred and delivered full seisin and possession.

That said possession continued in said Nolan and his heirs and legal representatives and those claiming under them, to and including the plaintiffs, from said date to the date of the filing of the petition in the Court of Private Land Claims, to wit, March 1, 1893.

It is also alleged that Gervacio Nolan, on July 12, 1855, presented his petition to the surveyor-general of New Mexico, praying a confirmation of said grant,

alleging that the grant was made by Governor Armijo to said Sandoval by virtue of authority in him vested by the Government of Mexico, "as will appear by the collection of statutes and decrees of the said Government, and also by communications addressed to the aforesaid governor by the authorities of the aforesaid Government of Mexico, and that the said communications are or should be deposited in the archives of the Territory of New Mexico, and to which he made reference."

That the said surveyor-general failed to act upon the petition of said Nolan, but, after the death of the latter, his widow and heirs renewed the same, and that their said petition was prepared and presented by Theodore D. Wheaton, who was then United States attorney for New Mexico, and familiar with the archives of the United States then kept in the city of Santa Fe; and in said petition the said Wheaton, as attorney for the widow and heirs, made the same allegations as to the existence in the archives of the laws and communications addressed to the governor as is made by counsel for the present claimants and appellants.

The spoliation and destruction of the archives subsequent to the appearance of United States Attorney Wheaton in behalf of the widow and heirs of Nolan renewing the claim made in 1855 by Gervacio Nolan, is alleged with much fictitious detail, particularly everything relative to the Estancia grant and the special communications to the governors of the department of New Mexico, especially those to Manuel Armijo.

Plaintiffs allege that they are in actual occupation and possession of the grant, under and by virtue of said grant and their acquisition thereof, except a comparatively small part thereof adversely held and claimed; that Eloisa Bergere and A. M. Bergere, for themselves and others unknown to the petitioners, and Mary T. Otero, Miguel A. Otero, Page Otero, Mamie J. Obrien and Harry J. Obrien are the only persons claiming said tract adverse to the petitioners and without their lease or permission.

The grant claimed is alleged to be a perfect title, and a complete and perfect title before and at the time of the cession of New Mexico to the United States.

It is alleged that said private land claim has not heretofore been confirmed, considered, or acted upon by Congress or the authorities of the United States, except only that, having been submitted to the surveyor-general, the same was examined and approved by him and recommended to Congress for confirmation in his report as No. 70, dated January 4, 1873; and thereafter the said granted tract of land was surveyed by direction of the said surveyor, and the survey, plat, and field notes were approved by him. That subsequently the Hon. George W. Julian, surveyor-general, and the Hon. William A. J. Sparks, Commissioner of the General Land Office, promulgated adverse opinions on said private land claim, but they aver that said last opinions were not promulgated within the competency or jurisdiction of the said officials last named.

The petition concludes with the usual prayer for relief.

On October 27, 1893, Eloisa L. Bergere and the others named in the petition as codefendants with the United States filed their joint and several answer, in which they urged a number of defenses, among others that they were possessors adverse to the petitioners of the land sued for, and were such under and by virtue of what is known as the Bartolomé Baca grant alleged to have been made by Fecundo Melgares, governor of New Mexico, on July 2, 1819.

It is proper to state that at the time the petition was filed in this case Eloisa Bergere and others had pending in the Court of Private Land Claims a suit for the confirmation of said Bartolomé Baca grant, in which suit these plaintiffs were joined as codefendants with the United States by reason of the overlapping of the two grant claims. In the Bergere case the Court of Private Land Claims confirmed the grant (Bartolomé Baca grant) to the extent of 11 leagues, but upon an appeal by the claimants and cross-appeal by the United States the entire claim was rejected (*Bergere et al.* v. *United States*, 168 U. S., 66).

By reason of the disposition of that claim before the trial of this cause by the court below, the codefendants of the Government were eliminated from the present case.

On December 29, 1896, the United States joined issue by its amended answer (R., 15–23), disclaiming knowledge sufficient to enable it to form a belief as to whether the said Antonio Sandoval presented his petition to the governor of New Mexico as alleged, or

whether the same was accompanied by the papers set forth, or as to their tenor and effect, and as to whether on December 7, 1845, a grant was made of said lands to Sandoval upon the terms alleged, or whether the possession was given; but the United States averred that if said grant were attempted to be made as set forth in the petition, the same was without warrant or authority of law and in excess of the powers of the said Armijo as governor, and therefore void.

It is also asserted that if said grant was made as alleged, it was void for the further reason that it was not made in accordance with law or for the purposes provided by the then existing laws, but as a reward for services rendered and money advanced; and that even if said grant was attempted to be made otherwise in conformity with law, it was and is void for the reason that it assumed to convey a vastly greater quantity of land than said governor had authority to convey to any one person.

The answer also averred that the same Antonio Sandoval mentioned and referred to in said alleged grant did, on November 5, 1824, petition the authorities of the then Territory of New Mexico for a grant of 1 square league at the place called Agua Negra, and that on November 19, 1824, a grant of said 1 square league was made to him by the territorial deputation, by and with the advice and concurrence of the political chief, Bartolomé Baca; that a claim for said grant of land was filed by Antonio Sandoval on October 21, 1856, before the surveyor-general of New Mexico, and that the same was, on September 17, 1857,

approved by him and transmitted to Congress, as report No. 12, for its action in the premises; that on June 21, 1860, an act was passed by Congress confirming the said grant to the said Antonio Sandoval, which said act and that part relating to said grant is set forth in paragraph 3 of the amended answer. (R., 16, 17.)

The defendant further averred that the said Sandoval, on November 24, 1845, presented to the governor of New Mexico a petition for a grant of a certain large tract of land in New Mexico called the Bosque del Apache, the same exceeding 11 square leagues in extent; that on November 28, 1845, said grant was made to said Sandoval by Manuel Armijo, the then governor of the department of New Mexico, and juridical possession thereof was delivered to said Sandoval on March 7, 1846, and the amended answer then sets out *in extenso* a translation of said petition and the act of juridical possession (R., 17–19), a reference to which by this court is now desired.

That in 1859 the said Sandoval presented said grant to the surveyor-general of New Mexico for his approval, and on July 20, 1859, the same was by him transmitted to Congress as reported No. 35, for its action in the premises. That the grant was confirmed by an act of Congress approved June 21, 1860, to the said Antonio Sandoval, that portion of which pertinent to the grant being set forth in Paragraph III of the amended answer (R., 19). That the same as surveyed and patented pursuant to said confirmation contains 60,117.30 acres, being 11,292.91 acres in excess of 11 square leagues.

The answer further avers that, under the laws of Mexico at the date of the making of this (Estancia) grant, it was not permissible that more than 11 square leagues of land should be united as property in a single hand, and that the power and authority of the governor to make this grant, even if he had such, irrespective of this restriction, was exhausted by the making of the said Agua Negra and Bosque del Apache grants to said Sandoval, said two grants being in excess of 11 square leagues, and that therefore the grant sued on in this case is void.

The defendant admitted that said tract was surveyed as a private land claim, but denied that said survey correctly shows the extent and boundaries or that the area of said grant is 415,036.56 acres; but on the contrary asserted that the area included within the natural objects named in said grant, when the same were properly located, would not exceed half that amount.

The defendant admitted the conveyance by Sandoval to Nolan in 1848, and that upon his death the same descended to his heirs at law, by whom the same was claimed until 1880; also the allegations as to the presentation of the claim to the surveyor-general on July 12, 1855, and his failure to act upon the same until after the death of Nolan, and that after his death the same was renewed by his widow and heirs at law as alleged.

It was further asserted by the United States that while this claim was pending before the Surveyor-General there was pending before Congress, upon the

report of the Surveyor-General, a claim by the Nolan heirs for the confirmation of a grant for a large tract of land situate in the State of Colorado, which said grant was made to Gervacio Nolan by Governor Manuel Armijo, dated December 1, 1843, and possession given by Cornelio Vigil, justice of the peace of Taos, on December 15, 1843; that under the provisions of the act of July 22, 1854, creating the office of surveyor-general for New Mexico, Kansas, and Nebraska, said claim was recommended to Congress for confirmation as reported No. 48; that said claim was thereafter confirmed by Congress by act of July 1, 1870, to the extent of 11 square leagues, which said act, in so far as it relates to said grant, is set forth in paragraph V of the amended answer (R., 21–22). That the land confirmed by said act was duly surveyed and patented under the provisions thereof to the extent of 11 square leagues. It was therefore alleged that the plaintiffs were not entitled to a confirmation of any portion of the land claimed in this suit, for that the said act of July 1, 1870, was a final adjudication on the part of the Congress of the United States of the rights of said Gervacio Nolan or his heirs and representatives in and to all private land claims under the treaty of Guadalupe Hidalgo.

The truth of all the allegations of the petition not specifically answered was generally denied, and it was prayed that the plaintiffs be put to strict proof of the same according to the provisions of the act creative of the Court of Private Land Claims.

On December 14, 1898, the cause came on for trial, at which time the plaintiffs introduced in evidence their muniments of title and filed translations of the same (R., 41–46), objection being made on behalf of the United States to their introduction because they were produced from private hands and did not purport to be *testimonios;* neither did they show in themselves nor was any evidence introduced that said attempted disposition had ever been made a matter of record in the archives of the department of New Mexico; nor was any connection shown with the record, or that the archives containing any reference to the same had been lost or destroyed. It was further objected that the genuineness of the signature of the alcalde to the act of possession had not been established; also because the Spanish title papers, consisting of the petition of Antonio Sandoval, the marginal order or decree of Governor Armijo, and the act of possession by the alcalde, Jose Baca y Ortiz, purporting to be originals, are not in proper custody, nor are their absence from the archives and their being in the custody of the plaintiffs accounted for, even if they had ever been in the archives. (R., 27.)

The petition filed by Nolan before the surveyor-general under the act of 1854, claiming the said grant, was also introduced. (R., 40–41.)

Also the petition of the widow and heirs of Nolan renewing the claim. (R., 48–49.)

Also the decision of the surveyor-general upon the same and his recommendation to Congress. (R., 51.)

Other instruments were introduced tending to show

that the plaintiffs had acquired such interest in the claim as enabled them to invoke the jurisdiction of the court.

There was considerable evidence introduced showing the spoliation and destruction of the archives of New Mexico in 1870 during the administration of Governor Pile. It is admitted that in the year 1870 the records in the possession of the secretary of the Territory were subjected to spoliation and destruction to a considerable extent, but it is suggested that nothing in the testimony or history of the Territory tends in any way to show that this grant was ever recorded or returned for that purpose, or that the evidence of such record was lost or destroyed during 1870 or any other time.

The United States tendered in evidence the supplemental report of Surveyor-General Julian (R., 62–66); also the report of the Commissioner of the General Land Office to Congress (R., 66–71), in relation to the grant.

The Government also offered in evidence a number of instruments from the office of the Surveyor-General, showing the claims made and the action of the political branch of the Government upon the Agua Negra and Bosque del Apache grants, confirmed to Antonio Sandoval, as particularly recited in its amended answer.

Counsel for the plaintiffs admitted that the statements of fact contained in these documents, and the allegations in the answer of the United States respecting them, were true, but as to their legal effect or like

conclusions to be drawn therefrom, no admission was made.

Production of the patents and surveys were waived, and it was admitted that the Bosque del Apache grant was patented in conformity with the report of the surveyor-general and the confirmation; but plaintiff's counsel, under his previous reservation, assigned the following objections to the instruments and proceedings tendered in evidence under said confirmation:

That the said instruments and proceedings are irrelevant, immaterial, and incompetent; that the Bosque del Apache grant was one in colonization and exceeded the powers of the governor under the law of colonization; that the Estancia grant, now in question, was not a grant in colonization; that the proceedings looking to the confirmation of the Bosque del Apache grant by this Government were subsequent to the transfer of the Estancia grant to Gervacio Nolan; at the same time expressly disclaiming any objection to the form or mode of proof of the instruments referred to.

The defendant introduced a number of documents tending to sustain the averments of the fifth paragraph of its amended answer and to the effect that a claim was presented by the heirs of Gervacio Nolan to the surveyor-general on October 2, 1860, praying the confirmation of a grant of a large tract of land alleged to have been made to him by Governor Armijo on December 1, 1843; as also the report of the surveyor-general, dated October 8, 1861, approving the same and recommending it to Congress for confirmation as reported No. 48, which grant was confirmed by act of Congress

approved July 1, 1870, to the extent of 11 square leagues, with certain provisos (16 Stat L., 646); and that the said grant was surveyed and patented to the extent stated according to the report and confirmation. The production and entry of the survey and patent in the record was expressly waived, as well as all objections as to form or mode of proof of any of said instruments, but the plaintiff reserved the following objections: That said instruments are irrelevant, immaterial, and incompetent; that the Estancia grant, now in question, was vested in the grantee and his assigns as a complete title, and it was not within the intent or constitutional power of Congress to divest that title by any provisos contained in the act confirming the Nolan grant, and that in fact the said act did not even presume to interfere with any prior vested title (R., 39). Counsel expressly waived objection to the form or mode of proof, and waived the production of the patent and survey.

It was also admitted by the plaintiff that the Antonio Sandoval and the Gervacio Nolan, referred to in these various proceedings, are the identical persons mentioned in the evidence on the part of the plaintiffs.

The Court of Private Land Claims, after elaborate arguments by counsel, rejected the claim and dismissed the petition. The claimants in due time appealed the cause to this court.

It was conceded in the court below by counsel for claimants that the grant was not made under the colonization law of August 18, 1824, and the regulations of November 21, 1828, as they had been repealed. It

was also admitted that the grant derived no validity from the laws passed subsequent to the constitution of 1836 under the policy declared by that of April 4, 1837.

As the majority opinion by Mr. Justice Sluss (R., 95–100) holds that the colonization law of 1824 and the regulations of 1828 were in force in New Mexico in the year 1845, notwithstanding the complete change of the policy of the Government in 1836 and the declaration in the law of April 4, 1837, that colonization should be made effective by sales, leases, or mortgages (Reynolds Spanish and Mexican Land Laws, 222), and as Mr. Justice Murray in his opinion (R., 102–112) assumes a position entirely opposite, holding that the law of 1824 and the regulations of 1828 were repealed and superseded by the latter policy and the laws enacted for its execution, it is thought proper to consider this case in the different attitudes suggested by the varying views of the Court of Private Land Claims, although the ultimate unanimity was attained that the grant should be rejected.

The United States does not insist on the defense set up in paragraph 5 of its amended answer (R., 21–22), under the provisos contained in section 5 of the act of July 1, 1870 (R., 22), confirming to the heirs of Gervacio Nolan 11 leagues of a grant made to Gervacio Nolan by Governor Armijo in 1843. Although the proviso is extremely broad, counsel does not believe it was the intention of Congress to deprive Nolan or his heirs of any rights they may have acquired by purchase in a grant made to Antonio Sandoval, although

at the time a claim by the heirs of Nolan was pending before Congress for confirmation of this grant, which they claimed through Nolan, who had held by purchase from Sandoval, the original grantee, but only intended to satisfy by said act of confirmation of July 1, 1870, all claims arising out of Armijo's liberal exercise of his assumed granting power in behalf of their ancestor, Gervacio Nolan.

I.

Assuming for the present that the colonization law of August 18, 1824, and the executive regulations of November 21, 1828, were in force in New Mexico in 1845, still this claim does "not appear to be upon a title lawfully and regularly derived from the Government of * * * Mexico," and under the authority of the cases of *United States* v. *Ortiz* (176 U. S., 422) and *United States* v. *Elder* (177 U. S., 104), and the California cases therein cited, it can derive no validity from such law and regulations.

The genuineness of the signature of the alcalde, José Baca, to the act of possession dated December 15, 1845, was not proven. The muniments of title, consisting of the petition of Sandoval, the certificate of the comptroller and ex officio treasurer of the department, the grant by the governor, and the act of posession were produced from the custody of the claimants, and no evidence or explanation was offered of the circumstances of their custody, nor tending to show that the same had ever been returned for record in the

archives of the department, nor that they had been recorded and the record thereof lost or destroyed. No connection was shown between the grant and the records of the department, while it was shown by Mr Tipton that he had "never seen a record in the sense of a book containing grants or memoranda of grants made by Governor Armijo; but as to whether there are any grants purporting to have been made by him among those papers which are called archives in the surveyor-general's office in distinction from private land claims filed there I am not perfectly certain, although I do not recollect ever having seen any such." (R., 32.)

It will be noticed that the grant in this case bears the indorsement: "Recorded in book letter B, pages 166 and 167, to which I certify that it may so appear. Donaciano Vigil, Recorder. Santa Fe, November 17, 1849." (R., 43, 46.)

Book B was a record provided for by the Kearny Code, and was an attempt on the part of the provisional and military government established by General Kearny to enable the inhabitants to preserve some evidence of their holding instruments of various kinds relating to lands and many other subjects. The fact of this indorsement clearly shows that the muniments of title to this grant were in private custody at that date.

The signatures of Sandoval and Governor Armijo, although shown by the testimony of Mr. Tipton to be genuine, he was unable to verify that of José Baca to the act of possession. Nor was the signature of José

Serafín Ramírez to the certificate of indebtedness proven (R., 45).

It has often been judicially declared to be part of the system of all well-regulated governments to preserve record evidence of all grants of the public domain, thus enabling the Government to ascertain with accuracy what portions had been disposed of; and as a protection against fraud and imposition, "the record was the grant, and without it the title was not divested" (*Peralta* v. *United States*, 3 Wall., 334, 440; *United States* v. *Elder*, 177 U. S., 104, 116).

Where the grant produced can not be verified by such test, although the genuineness of the various signatures may be established, the courts, before recognizing the validity of the claim, will scrutinize with extreme care any circumstance tending to throw any light upon the transaction "both as to the authority of the governor to make them and the *bona fides* of its exercise, to prevent imposition and fraud."

The only evidence of possession is such as flows from the presumption predicated upon the recitals in the act of possession by Alcalde José Baca, designating himself in the body of the same as José Baca y Ortiz. As the execution of this instrument has not been proven, it would seem quite necessary, as all muniments of title were produced from the custody of the claimants, and no connection shown with the records, that the character and extent of the possession be clearly shown.

It was alleged that a comparatively small part of

the land claimed was adversely held and claimed by Eloisa Bergere and A. M. Bergere, her husband, for themselves and others named.

It was held in the recent case of *United States* v. *Ortiz* (176 U. S., 422, 425), from Court of Private Land Claims, upon an unrecorded grant by Governor Armijo made in 1846, that—

> The statute authorizes no presumption in favor of genuineness of a title from the mere fact that the claimant for confirmation presents a paper which is asserted to be a grant from a Mexican official. The command of the statute is not that the United States, when an alleged Mexican title is presented for confirmation, shall be put to the burden of showing that the title in question is not genuine, but that the evidence present in favor of the asserted title shall be of such persuasive and preponderating force as to convince the court that the title is real, and besides, possesses the legal attributes which the statute requires as essential to confirmation. * * * The law cast, primarily, upon the applicant for confirmation the duty of tendering such proof as to the existence, regularity, and archive record of the grant, as well as his connection with it, such as possession, ownership, and other related incidents, of sufficient probative force to create a just inference as to the reality and validity of the grant, before the burden of proof, if at all, can be shifted from the claimant to the United States.

It was alleged and proven that just a few days prior to the making of this grant by Governor Armijo,

he made to Antonio Sandoval, the grantee in this case, another grant to the Bosque del Apache tract, containing over 60,000 acres, which was recognized by this Government and confirmed to its full extent by Congress by act approved July 20, 1860 (reported No. 35).

It will be noticed that the petition of Sandoval was dated November 24, 1845 (R., 82), just eleven days prior to the date of his petition for this grant, December 5, 18 5 (R., 44); that the granting order of Governor Armijo for the Bosque del Apache grant was dated on November 28, 1845 (R., 82, 83), just ten days prior to the date of the granting order in this case, December 7, 1845 (R., 44, 45). It appears, however, that the act of possession by the alcalde, Vincente Pino, was not executed until March 7, 1846 (R., 3, 84), while the act of possession for the grant in controversy appears to have been executed by José Baca on December 15, 1845 (R., 45, 46).

The close proximity of the dates of these two grants must have been a matter attracting the attention of Governor Armijo. The consideration for and the express exemptions accorded both grants in the orders of the governor are the same, viz:

> *Bosque del Apache grant*, dated November 28, 1845, meritorious services rendered the country personally, with his property in forced loans and in other ways, the same to be free from all and exempt from tax. (R., 82-83.) 60,117.30 acres.

Estancia grant (now in controversy), dated December 7, 1845, valuable services that he has rendered and is now rendering, and the sum now due him being $9,000.00. (R., 44-45.) 415.036.56 acres.

The Agua Negra grant was made to Antonio Sandoval on November 19, 1824, by the territorial deputation, and possession given on December 5, 1824. This grant was recognized and confirmed for 1 square league, or 4,338.46 acres, by act of Congress approved June 21, 1860 (reported No. 12).

It appears by the evidence that this Government has recognized and confirmed to Sandoval's legal representatives 64,455.76 acres of land, and the question fairly presents itself, Has not the United States about satisfied all of its obligations to Sandoval under the treaty? This case stands upon a claim barren of any equities and appealing to no sense of justice for favorable recognition.

The rights acquired by the claimants are only such as Antonio Sandoval had at the date of the treaty. The case rests upon a bare paper title at best, and the observations of this court in *Peralta* v. *United States* (3 Wall, 440), that "written documentary evidence, no matter how well supported by the testimony of witnesses, will not suffice if it is obtained from private hands, and there is nothing in the public records of the country to show that such evidence existed;" or, as suggested in the case of *United States* v. *Teschmacher* (22 How., 405), "we do not say that the absence of the record evidence is of itself necessarily fatal to the

proof of title, but it should be produced or its absence accounted for to the satisfaction of the court."

If the records have been lost or destroyed, some connection should be shown between the grant and the lost records. The original cases announcing this doctrine have been cited with approval in the recent case of *United States* v. *Ortiz* (176 U. S., 422).

Standing upon a bare paper title, it is not believed that this grant has been established by full legal proof "of such persuasive and preponderating force as to convince the court that the title is real, and besides possesses the legal attributes which the statute requires as essential to confirmation." (*United States* v. *Ortiz*, *supra.*)

If we discard the express consideration for this grant, and assume that the act of Governor Armijo might possess some validity by reason of the limited power conferred by the law of 1824 and the regulations of 1828, yet by making the grant to Antonio Sandoval of the Bosque del Apache tract, on November 28, 1845, for 60,117.36 acres, which was 11,292.91 acres in excess of 11 square leagues, the governor exhausted his power to favor Sandoval, and the recognition by the United States of this previous grant satisfied all the obligations which this Government assumed under the treaty toward him or those standing in his shoes. Vide *United States* v. *Hartnell's Executors* (22 How., 286); *Rowland* v. *United States* (7 Wall., 743, 750).

It was held in the case of *Fuentes* v. *United States* (22 How., 443, 454) that the "Act of 1824 and the regulations of 1828 are limitations upon the power of

the governor to make grants of land. *They are, and were also considered to be, directions to petitioners for lands before they could get titles.*"

So that, whether in 1845 the colonization law of 1824 and the regulations of 1828 were in force in New Mexico or not, it is clear this grant can not be sustained under them, and the appellants must look elsewhere for authority in Governor Armijo to make their grant.

This branch of the case is elaborately discussed in the opinion of Surveyor-General Julian (R., 62–66) and the Commissioner of the General Land Office (R., 66–71).

II.

Believing this claim can derive no validity from the law of 1824 and the regulations of 1828, nor from the laws on colonization passed under the constitution of 1836, yet, if neither was in force in 1845, it can not be admitted or conceded that the grant can be sustained by reason of any special order, decree, or communication from the supreme executive, for that no evidence was tendered of their issuance, nor as to their character or purport. While the court will take judicial notice of the general laws, still all special orders and communications must be affirmatively proved.

This consistently carries us to the position taken by appellants' counsel in the court below, viz:

That this grant was not one under the colonization law of 1824 and the regulations of 1828; that they were not in force at the date of the grant, having been

repealed by the change in the form of government from a territory to a department in 1836, and especially by the laws adopted shortly after that time for the greater security of the national debt. And, as a consequence of this condition, the contention was naturally made by appellants' counsel that the limitation contained in the colonization law of 1824 that not more than 11 square leagues could be granted by the governor to one individual was not in force at the date of this grant, and hence, even if Antonio Sandoval had previously received other grants under the colonization law, exceeding in amount 11 square leagues, the restriction imposed therein, had no bearing in the present case. Further, that the existence in New Mexico, at the time of this grant, of an authoritative granting officer invested with the prerogatives of the sovereign, being in fact an arm of the national sovereignty, is to be assumed from the attempted exercise of that superior function in making this grant, and the indulgence of such a presumption in this case leads to the conclusion that Governor Armijo was not only authorized to make this grant to Sandoval, notwithstanding the fact that he had, only ten days before, made him another grant for over 60,000 acres, but that he was authorized to make a grant to Sandoval for any quantity which he might see fit; again, that Armijo's action was evidently no abuse of this power, since it was shown that the departmental government of New Mexico was indebted to Sandoval in large amounts.

In so bounteously and gratuitously delegating the supreme power of the *national* government to departmental officials who, by the very nature and essence of the political plan then in being, were constitutionally restricted in the exercise of their functions, counsel for appellants attempts to find his license in the doctrine promulgated in the Louisiana and Florida cases, especially those of *United States* v. *Arredondo* (6 Peters, 691), *Perchman* v. *United States* (7 Peters, 51), *United States* v. *Clarke* (8 Peters, 436), *De Lassus* v. *United States* (9 Peters, 117), and *Strother* v. *Lucas* (12 Peters, 410), which, as stated in the latter case, is that:

> Where the act of an officer to pass the title to land according to Spanish law is done contrary to the written order of the King, produced at the trial without explanation, it will be presumed that the power has not been exceeded, and that it was done according to some order known to the King and his officers, though not to the subjects, and courts ought to require very full proof that he transcended his powers before they so determine. (P. 438.)

Mr. Justice McKenna said, in the case of *United States* v. *Coe* (170 U. S., 681), citing *United States* v. *Cambuston* (20 Howard, 59), that "these principles were asserted of Spanish titles in the Territories of Louisiana and Florida. They are disputable in their application to titles under Mexican laws."

Such a principle as is sought to be invoked in this case by counsel for appellants was of permissible application under the private land claim acts from 1803 to 1828, and the reasons therefor were fully con-

sidered in the *Arredondo case* (6 Peters, 719–726). And in deciding that case, after separately considering the provisions of each act relating to the rules of decision laid down by Congress for the guidance of the commissions, the court summed up the result of all legislation *in pari materia* at the time as follows (p. 727):

> It is thus clearly evidenced by the acts, the words, and intentions of the legislature, that in considering these claims by the special tribunals, the authority of the officer making the grant, or other evidence of claim to lands, formed no item in the title it conferred; that the United States never made that a point in issue between them and the claimants to be even considered, much less adjudicated.

The impropriety of the application of such principle to claims arising under the act of March 3, 1891, creating the Court of Private Land Claims, was considered in the opinion of Mr. Justice White in *Hayes* v. *United States* (170 U. S., 637, 647–649), and in discussing the the prohibition contained in the first subdivision of the thirteenth section of that act, he said:

> That court and this court on appeal are expressly prohibited from allowing any claim under the act "that shall not appear to be upon a title lawfully and regularly derived from the Government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land." This manifest limitation upon the power of the court in passing upon the validity of an alleged complete grant requires that the court shall not

> adjudge in favor of validity unless satisfied from the inherent evidence contained in the grant, or otherwise, of an essential prerequisite to validity, viz, the authority of the granting officer or body to convey the public domain.
>
> In this respect the act of 1891 is materially different from the statutes construed in the *Arredondo case* (6 Peters, 691). * * * But in the act of 1891 the court is required to be satisfied, not simply as to the regularity *in form*, but it is made essential before a grant can be held legally valid that it must appear that the title was "lawfully and regularly *derived*," which imports that the court must be satisfied from all the evidence that the official body or person assuming to grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently ratified.
>
> Controlled, as we are, by the grant of power conferred by the act of Congress, we are unable, when the record discloses that the grant was not "lawfully and regularly derived * * * from any State of the Republic of Mexico having authority to make grants," to hold that it should nevertheless be confirmed because, although the proof convincingly shows that the grant does not not conform to the requirements of the act of Congress, the grant yet must be held valid because of a supposed legal presumption.

Independent of laws providing rules of decision in these cases and the pertinency of the application of such a presumptive principle in the consideration of grants made by royal officers possessing vice-regal

authority, its appropriateness is broadly denied when applied to claims arising under the laws of a popular government existing solely by virtue of the constitution; especially is this true in view of the fact that Mexico, "after its separation from Spain in 1821, was asserting to act as a republic, subject to express constitutional limitations. While temporary departures are disclosed in her history, the dominant and continuous thought was of a popular government under a constitution which defined rights, duties, and powers." (*Camou* v. *United States*, 171 U. S., 277, 290.)

In a government by law the powers of all its officials are derivative. The law measures the power. Its executives are creatures of the law and their powers are measured thereby. It would be portentous indeed if the courts for an instant departed from the principle that the United States, and as well the Republic of Mexico, are governments by law and that "no man in this country is so high that he is above the law; no officer of the law may set that law at defiance with impunity; all the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it." (*United States* v. *Lee*, 106 U. S., 196, 209.)

Respectfully submitted.

JOHN K. RICHARDS,
Solicitor-General.

MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.

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